Brexit in the Supreme Court – a landmark ruling, or monumental waste of time and money?

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06/02/2017

*The Miller case was of great interest to the legal and political establishment. But was it a landmark ruling for constitutional law? On the contrary, argues **Simon Witney**: the case was all about politics. Parliament made an error in drafting the EU Referendum Act, and then failed to clarify it. But Parliament, as this week's vote showed, was quite content for the government to trigger Article 50. Enlightening though it was, the whole case was a waste of time and public money.*

To an interested observer, the case brought and ultimately won by Gina Miller against the UK government – arguing that an Act of Parliament is required before the government has authority to give notice of the UK's intention to leave the European Union – has certainly been fascinating, on a number of levels. Of course, the legal arguments over the extent of the ancient prerogative powers in our modern constitutional settlement and their interactions with rights granted by Parliament have given rise to endless discussions among lawyers, often through their personal blogs.

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But equally fascinating has been the way in which the traditional media, and to some extent the public, has reacted to the case: some apparently arguing that the interference of the judiciary in a question of constitutional law is unwarranted; others speculating that the case could interfere with the government's timetable for triggering the now-famous Article 50, or even scupper its plans to leave altogether. Some of this commentary has been well-informed, but much of it has not been, and has revealed a lack of familiarity with the UK's constitution – which is not altogether surprising, given that it draws upon such a vast array of ancient and modern legal sources.

Actually, the legal arguments, while difficult, are quite trivial. The general principles underpinning the relative power of Parliament and the executive, and the role of the referendum in our modern democracy, were not disputed among the parties to the case, or the expert commentators (even though, in reality, there is a need to reconsider the role of the referendum if it is to be used more often in contemporary politics). Parliament is sovereign, as every first-year law student knows, and prerogative powers – the powers reserved to Ministers – can be given or removed by an Act of Parliament at will. Referendums have, at the moment at least, no constitutional status other than that conferred on them by (an Act of) Parliament.

The crucial question in this case, interesting though it was, only involved applying those principles: did Parliament give UK citizens any rights when it passed any of the various Acts of Parliament to give effect to EU law (if so, it

would plainly undermine Parliament's sovereign position if the executive were allowed to take them away without Parliament's consent), and (even if such rights had been conferred by Parliament), had Parliament consented to someone else removing those rights – either implicitly or explicitly in any of those Acts of Parliament (or in a different one; for example, in the European Union Referendum Act)?

That these questions were hard is evidenced by the fact that the government's expert legal advisers, along with many other lawyers and three Supreme Court judges, appear to have been wrong about them (or, perhaps more fairly, to have disagreed about them). But the fact that they were hard questions, and interesting to those of a legal bent, does not make them important.

Much more significant than the lack of serious disagreement among lawyers about the legal principles involved is the manifest absurdity to which those principles give rise: **given that Parliament, and – ultimately – only Parliament, is in charge of deciding what powers it has over when and if Article 50 is triggered (and given that Parliament is always free to change its mind), why on earth was another body, the Supreme Court, needed to make any determination at all?**

The first, and superficial, answer to that question is that Parliament had made a mistake. Instead of being clear and explicit in any of its previous enactments, and most significantly in the European Union Referendum Act itself, as to the power of the government to withdraw the UK from the EU, it had made it very hard to discern its intention. There is a very important lesson there for Parliament staff drafting laws. A relatively simple clause in any one of a number of Acts of Parliament would almost certainly have avoided the need to go to court in the first place, and saved the taxpayer very significant expense. (Similarly, although perhaps with a little more difficulty, the role of the devolved governments could have been clarified in the Acts of Parliament that created them.) It may be unfair to criticise the drafters of the Act with the benefit of hindsight, but they will surely take heed of the lesson.

But having made a mistake in the first place, why didn't Parliament step in and rectify its own error? As soon as the doubt over Parliament's intentions was identified, why didn't the sovereign legislature just clarify them? Of course, Parliament's view on the appropriate role of Parliament in this process might well have changed since 1972, and even since the European Union Referendum Act in 2015, but even more reason for it to step in now: Parliament is at liberty to change its mind on such questions (and frequently does), so while the courts were trying to discern the intention of Parliament as expressed in the past, why not just ask Parliament to tell us what they want to do now, in the situation faced by the UK at the end of 2016? Why let other people, even people as learned as the 11 Supreme Court judges, make a judgement about who had power to trigger Article 50 when that judgement could have been taken out of their hands to give not only a better answer, being the actual will of Parliament today, but also a much cheaper and quicker one? After all, having given plenty of notice that it intended to exercise a purported prerogative power, the government had given Parliament ample opportunity to revoke any power that the government may have had, or confirm that it never had it in the first place.

The answer to this second question, in part, relates to the power that the government has over Parliament's legislative agenda. There are ways for Parliament to originate laws, and even to pass them in the face of government opposition, but there are significant and well-documented political and procedural difficulties in doing so. In the end, however, the government has to keep Parliament on-side, or at least it has to have the confidence of the House of Commons, which means that Parliament can, if a majority of MPs take a particular view, put irresistible pressure on the government to act (or not to act). Such pressure may fall short of passing a new law, but a government which relies on its backbench MPs to get its day to day business done ignores their views at its peril. In this particular case, a resolution of the House of Commons urging the government to bring forward a Bill authorising it to trigger Article 50, would surely have done the trick.

So the real question is why Parliament did not do that. And the answer is obvious, and even more obvious now that such an Act is before Parliament. It is because **Parliament – meaning a majority of its members – was content for the government to trigger Article 50 in March**, and will now give it that authority quite quickly. It didn't feel the need to affirm the government's right to do so, and the government was reluctant to open a political can of worms by

asking it for the authority that the government surely knew that it would get.

So, in the end, this “landmark” case was all about politics and will have little impact on constitutional law. True, it reaffirmed the very important right for an “ordinary” citizen (in reality one who is wealthy, or has the means to access significant financial resources) to challenge her government when it exceeds its powers. It has taught many people (including this author) some important lessons about the UK’s constitutional settlement, and highlighted some of its strengths and weaknesses. It has given scholars of constitutional law even more reasons to think about whether the legislature should have a greater degree of separation from the executive, or at least have more ways to express its will and force the government to act when it disagrees with what it is doing. Those who draft and scrutinise Acts of Parliament will no doubt be more careful in future to clarify the respective roles of the three central constitutional powers.

But in this case, a quick and easy resolution was available and not taken. Parliament did not make strenuous efforts to object to the government usurping a power that it had (or might have) reserved to itself because it was quite happy, in the circumstances, for the government to have that power. And **the government refused to introduce a Bill, and then defended and appealed the Miller case, because it did not want to have a fight in Parliament, even though it would have won that fight**. So, yes – in the end, this important case was an avoidable and monumental waste of time and money.

I am grateful to my colleagues Robert Craig and Jo Murkens for very helpful comments on an earlier draft. All errors and omissions are, of course, my own.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

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